



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 431 OF 2016

SAID NZAI RUWA & 11 OTHERS.....CLAIMANTS

VERSUS

READY CONSULTNCY COMPANY LTD.....RESPONDENTS

J U D G M E N T

INTRODUCTION

1. The claimants were all employed by the respondent as security guards and assigned to guard Mombasa maize millers facilities until 30/9/2015 when their services were terminated. The claimants aver that the termination was unfair because it was without any reason and it was done without following the due process. They have therefore brought this suit claiming salary in lieu of notice, compensation for wrongful termination, general damages and gratuity.

2. The respondent has denied the alleged wrongful termination of the claimants services and avers that as an outsourcing company contracted by Mombasa Maize Millers and other companies to provide labour, she transferred the claimants to Texas alarms Security but the claimant's declined to take the transfer despite them having been paid their dues before the transfer.

3. During the pre-trial conference, the respondent admitted that she terminated the claimant's services but denied that the termination was unfair. The parties therefore invited the court to determinate whether the termination was unfair and whether the reliefs sought ought to issue. The parties also agreed to dispose of the suit by written submissions on the basis of the pleadings, witness statements and documentary evidence filed.

CLAIMANT'S CASE

4. The first claimant was employed in 2008 and was assigned at residence of the directors of Mombasa maize millers Mr. Omar Ahmed. The second claimant was employed in 2012 and was assigned at Mombasa maize millers at Kingorani, third claimant was employed in 2008 and assigned at Mombasa maize millers premises at Magongo. The third and forth claimant were employed in 2010 and were assigned at Mombasa maize millers at kingorani. The forth claimant was employed in 2008 and was assigned at Ali Ahmed residence at Tudor. The sixth, seventh, eighth, ninth, tenth and twelveth claimants were employed in 2014, 2013 and 2008 respectively and they were assigned at various premises of Mombasa maize millers. Lastly the eleventh claimant was employed in 2008 as security officer and later promoted to overall supervisor of security officers.

5. On the 23/7/2015, the respondent issued a notice that terminating the services of all her guards attached at the Mombasa maize millers Milly branch effective 31/8/2015. On 31/7/2015, the respondent reported the said termination notice by her letter dated 31/7/2015 on grounds that the notice had been erroneously posted. On 20/8/2015, the respondent issued a fresh notice terminating the services of all her guards assigned at the Mombasa maize millers effective 30/9/2015 and offered to pay their terminal dues once clear with the respondents manger/supervisor. The letter was copied to the client (Mombasa maize millers), secretary of trade union and labour.

6. The claimants complied with the notice and after termination; they were paid their terminal dues including leave/gratuity except Paul Mwanja who never signed his discharge voucher. They now pray for 12 months salary as compensation for wrongful termination, gratuity and one month salary in lieu of notice.

DEFENCE CASE

7. M/s Gloria Endekwa the Operations Manager for the respondent stated in her written statement that the respondent is an outsourcing firm which provides labor services to Mombasa maize millers and other companies. She admitted that all the claimants herein were employed as guards by the respondent and assigned to Mombasa maize millers until the client ended the respondent's contract and engaged Texas Alarm Security Company Ltd. The later company offered to absorb the claimants in their company as guards but they refused the said transfer of services despite them having paid their terminal dues. She denied claim for gratuity contending that the contract of employment did not provide for the same. She concluded by stating that the claimant's were paid salary in lieu of notice.

ANALYSIS AND DETERMINATION

8. There is no dispute that the claimants were employed by the respondents and assigned as security guards at the Mombasa maize millers. There is no dispute that Mombasa maize millers terminated the outsourcing contract with the respondent and engaged Texas alarms Security company Ltd. There is further no dispute that as a result of the foregoing, the respondents issued termination notice to all the claimants effective 30/9/2015.

Wrongful termination

9. The claimants have contended that the termination was wrongful because it was without any reason and it was done without following the due process. On the other hand the defence case is that after Mombasa maize millers outsourced security guards from Texas alarms Company Ltd, she transferred the claimants to Texas Alarms who was offering to absorb them but the claimants refused the transfer even after being paid their terminal dues. After careful consideration of the evidence presented to the court, I did not see any offer letter from the respondent transferring the services of the claimants to Texas alarms or any letter from the latter offering to absorb the claimants into her establishment. In addition no evidence was adduced by the defence to prove that indeed the respondents and Texas Alarms had negotiated a transfer of services of the claimants from the latter to the latter company.

10. During the pretrial conference, the respondent admitted that she terminated the services of the claimants. Under section 45 of the Employment Act, termination of employees' employment is unfair if the employer fails to prove that the termination was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case the reason for the termination was not stated in the termination notice and also in the pleadings herein. However on a balance of probability, it appears from the material presented to the court that the reason for terminating the claimants services was redundancy. The respondents witness stated that their client outsourced security services from another company which was willing to absorb the claimants but they refused the offer.

11. The burden of proving that the services of the claimant were redundant was upon the respondent as required under Section 43 and 41 of the Act. According to the defence witness, the respondent was an outsourcing firm which provide labour services to various clients. In this case she had not proved that she

could not transfer the claimants to any of her other clients. In my considered view the respondent did not prove on a balance of probability that as a result of the termination of her contract services with Mombasa maize millers, she could not continue employing the claimants. That failure to prove the validity of the redundancy rendered the termination unfair and wrongful under Section 43 and 45(2) (a) of the Act.

12. As regards the procedure followed, it is clear that the respondent terminated the services of the claimants by a notice in writing addressed to one specifically but copied to the claimant secretary general of the claimants union and labour. The notice suggested that the claimants were members of a trade union and it was possibly done in line with Section 40 of the Act which provides for the procedure of terminating employment contract on account of redundancy. The said section provides that before terminating the services of his employee, the employer shall first serve at least one month notice in writing upon the employee of his trade union if he is a member of a union, and the labour officer. Thereafter, the employer must conduct a selection process of the employees to be laid off having regard to experience, qualification and years of service. After identifying the staff to be laid off, the employer must pay salary in lieu of notice, all accrued benefits plus severance pay.

13. With due respect, the termination notice dated 20/8/2015 fell short of a redundancy notice as contemplated by Section 40 of the Act. It was not addressed to either the claimants personally or their trade union. It was also not addressed to the labour officer Mombasa in whose jurisdiction the claimants were employed. The termination notice was therefore not a redundancy notice within the meaning of Section 40 of the Act.

14. On the other hand, the claimants were not subjected to a fair process of selecting them for redundancy. The respondents merely terminated because they were assigned to work at the Mombasa maize millers. That was in my view discriminatory and wrongful. The claimants were not employed to work at the Mombasa maize millers only. They were first and foremost employees of the respondent just like any other and when it comes to redundancy, they were entitled to be treated equally with the other staff of the respondent when selecting the staff for lay off. Their trade union and the labour office Mombasa were not involved in the redundancy exercise and the principles redundancy provided under Section 40 of the Act, including first in last out were never followed in this case. The claimants were terminated just because the respondent's contract of services at the Mombasa maize millers was terminated. This procedural default plus the fact that the respondent has failed to prove the reason for terminating the claimants as valid and fair and did not pay redundancy dues, I find and hold that the termination of the claimants services was unfair and wrongful within the meaning of Section 45 of the Act.

Reliefs

15. Under Section 49 of the Act, I award the claimants one month salary in lieu of notice plus six months salary as compensation for wrongful termination. In awarding the above damages, I have dismissed the respondent's allegation that the claimants were paid salary in lieu of notice before termination. The vouchers produced by the claimants as evidence only show that the claimants were paid leave/gratuity. In addition, I have awarded the compensation after considering the fact that the claimants had served for fairly long period and that they did not contribute to the termination through misconduct.

16. The claim for gratuity is however dismissed for lack of evidence that the claimants were entitled to the same. As alleged by the defence witness the contract of employment did not provide or gratuity. That contention by the defence has not been contested by evidence from the claimants. Likewise the claim for general damages is dismissed for lack of basis.

Summary of individual awards

SAID NZAI RUWA

Notice15900

Compensation 95400

111,300

RASHID RAJABU

Notice15900

Compensation95400

111,300

PAUL MWANIA

Notice17700

Compensation.....106200

123900

Dominic Malemba

Notice15000

Compensation95400

111300

Nancy Wandera

Notice15900

Compensation.....95400

111300

Wario Ali

Notice17700

Compensation.....106200

123900

Juma Wire

Notice17700

Compensation.....106200

123900

Edward Ngowa

Notice17700

Compensation.....106200

123900

Ali Muhamed

Notice18600

Compensation.....111600

130200

Suleiman Nassib

Notice15900

Compensation.....95400

111300

DISPOSITION

17. For the reason that the claimants services were wrongfully terminated, I enter judgment for them in the aggregate sum of ksh.1,417,500 plus costs and interest.

Dated, signed and delivered this 29th September 2017

O.N. Makau

Judge